

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

PALLET COMPANIES, INC.,
A SUBSIDIARY OF IFCO SYSTEMS, N.A., INC.

and

Case No. 4-RC-093398

UNITED FOOD AND COMMERCIAL WORKERS UNION,
LOCAL 1350

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for the Employer.

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ADMINISTRATIVE LAW JUDGE'S REPORT AND RECOMMENDATIONS ON
OBJECTIONS

I conducted a hearing in this matter on September 4, 2013 in Philadelphia, Pennsylvania. I have considered the entire record¹ and the briefs of the Employer and the Union.

Procedural Issues

The Petitioner, United Food and Commercial Workers Union, Local 1350, filed a petition to represent employees of the Employer, Pallet Companies, a subsidiary of IFCO, N.A., Inc., on November 16, 2012. Pursuant to a Stipulated Election Agreement, the Board conducted a secret-ballot election at the employer's facility in Burlington, New Jersey on December 20, 2012. The bargaining unit agreed upon is "all full-time and regular part-time truck drivers and production employees, including nailers, saw room operators, and fork lift drivers" employed at the Employer's Burlington, New Jersey facility.

¹ I tried unsuccessfully, with the assistance of the NLRB help desk to view the videos of the Coltenback and Rios depositions. However, contrary to note 9 at page 21 of the Employer's brief, I conclude that there are not any credibility resolutions in this matter than turn on the demeanor of either Coltenback or Rios. First of all, I credit Rios' testimony at deposition Tr. 21-22. However, given the lack of specificity as to the date(s) and frequency of Rios' observations, I do not find this testimony relevant to the outcome of this matter. Coltenback's denials of having spoken to Abdul Muhammad about drugs and LaRocca bringing drugs into the facility are also immaterial given the fact that I have credited Rios' deposition testimony.

Respondent's business at the Burlington facility is the repair of wooden pallets for such companies as Dunkin Donuts. The pallets are brought to the facility by the Employer's truck drivers and unloaded by the Employer's fork lift drivers. Fork lift drivers take the pallets to the "nailers" who repair the pallets. Nailers are paid 30 cents per pallet plus an hourly wage of \$8 per hour. Badly damaged pallets take longer to repair than slightly damaged pallets. Thus, a nailer's wages depend on the number of pallets he or she gets from the forklift driver and the relative condition of the pallets. Some of the Employer's nailers were, at the time of the election campaign, living at the Bo Robertson halfway house. These nailers were subject to being returned to prison if they failed a drug test and for other reasons.

23 votes were cast for the Petitioner and 20 against it. There were no challenged ballots. On December 27, 2012, the Employer filed a timely Objection to conduct affecting the results of the election:

Upon information and belief, the union's lead organizer distributed heavy narcotics to several IFCO employees during the critical period to influence the outcome of the election. As a direct consequence of the actions of the union's organizer, employees were unavailable to vote in the election and the outcome of the election was affected.

On January 3, 2013, the Employer filed two additional objections. These were not timely filed under the Board's rules at section 102.69. That section requires that objections be filed within 7 days of the tally of the ballots.

One of these alleged that the Employer's forklift drivers supplied its nailers with fewer pallets or pallets that were more difficult to repair to coerce nailers who either opposed the Union or were undecided into supporting the Union. Anti-Union nailer Sean Varlow complained to management and the Employer's Labor Consultant Lauren Rosenfeld about this situation several weeks prior to the December 20 election, Tr. 56, 60-61.

The second was that several pro-Union employees threatened an employee after he gave a speech to other employees explaining why he did not support the Union. The employer became aware of the contentions in the regard by employee Stephen Diamond sometime prior to January 3, 2013. The record does not indicate the date on which the Employer learned of the alleged threats, Tr. 40.

In *Rhone-Poulenc, Inc.*, 271 NLRB 1008 (1984), the Board held that it would consider evidence of conduct unrelated to the timely filed objections, but only when the objecting party demonstrates by clear and convincing proof that the evidence is not only newly discovered but was previously unavailable. The Board has also held that an election may be set aside on the basis of misconduct discovered by the Regional Director during the course of a post-election investigation, even though such conduct was not specifically alleged in the objection, *White Plains Lincoln Mercury*, 288 NLRB 1133, 1139 (1988). I interpret this holding as requiring me to consider all the evidence in this record in deciding whether to certify the election results regardless of whether they relate to a timely filed objection.

This representation case was originally consolidated with an unfair labor practice proceeding which was settled. Thus, I conducted an evidentiary hearing in Philadelphia, Pennsylvania on September 4, 2013 only with regard to the Employer's objections.

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The merits

Alleged drug distribution by a union "organizer"

10 The employer's allegations regarding drug distribution concern Tyrone LaRocca (aka "Ghost"), a forklift driver at the Burlington plant, who was the most active of the Union's supporters during the election campaign.² One of the issues in this case is whether LaRocca should be considered an agent of the Union; another is whether his conduct, alone or in conjunction with other alleged misconduct, warrants overturning the results of the December 20, 2012 election.

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The evidence bearing on this objection is contained in the deposition of John Rios (aka John Egnatowicz) taken at South Woods State Prison on August 27, 2013, Er. Exh. - 6. Rios worked as a nailer at the Burlington facility while living at the Bo Robertson half-way house. He tested positive for drug use and was sent back to prison. I assume this occurred prior to the December 20, 2012 election. Rios testified that marijuana use was commonplace amongst employees at the Employer's facility long before the Union began its organizing campaign. It was Rios who approached LaRocca to obtain drugs, not the other way around (deposition transcript 22-23).

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25 Rios also testified that he did not discuss the Union in the course of obtaining drugs from LaRocca. Then he was asked the following question at the deposition Tr. 21-22.

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Q. And your statement here, the person that you've seen do this, this was in relation to selling it to you. You didn't see him with other people, did you?

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A. Yes...

Q. Was Mr. Coltenback one of those other people?

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A. Yes.³

Kristofer Coltenback was also deposed on August 27.⁴ He also worked as a nailer and lived at the half-way house. It is clear that he was sent back to prison for reasons other than drug use, Tr. 100-101. Coltenback was apparently returned to prison for failing to deposit some of his earnings with the half-way house.

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² LaRocca served as the Union's election observer on December 20. Witness Sean Varlow served as the Employer's observer.

³ If LaRocca distributed drugs to Coltenback or others, there is no evidence as to when this occurred. Rios began working for the Employer in September 2012. I credit Rios' testimony that is cited above.

⁴ I have had my office mark the Coltenback deposition as Petitioner's exhibit P-2, see Tr. 6-7.

Therefore, even assuming that LaRocca can be considered an agent of the Union in distributing drugs to Rios, this would not have affected the outcome of the election.⁵ Assuming Rios would have voted against union representation, the Union would have still prevailed 23-21. Thus, this objection is overruled.

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Threats by Pro-Union employees

10 The evidence supporting this objection is the uncorroborated and contradicted testimony of Stephen Diamond, who worked as a truck driver at the Burlington facility. Diamond testified that on December 18, two days before the election, he tried to tell about 20-25 employees why they should vote against union representation in the Employer's lunch room. He testified that within 10 seconds of starting his talk, he was shouted down by two employees, Keith Little and Rudy Curvy. These two employees stated that Diamond was being paid by the company and/or that he was a company man. They also told other employees not to listen to Diamond.

⁵ While LaRocca was an special agent of the Union for some purposes, I decline to find that he was acting as its agent in making a private drug transaction with Rios, *Davlan Engineering*, 283 NLRB 803 (1987); *Pierce Corp.*, 288 NLRB 97 (1988); *Cambridge Wire Cloth Co.*, 256 NLRB 1135, 1139 n. 18 (1981).

Given my disposition of the objections on the merits, it may not be necessary to determine whether Tyrone LaRocca should be considered a general agent of the Union as the Board found a unit employee to be in *Bristol Textile Co.*, 277 NLRB 1637 (1986) and *Bio-Medical of Puerto Rico*, 269 NLRB 827, 828 (1984). However, I conclude that this case is clearly distinguishable for reasons similar to those set forth by the Board in *United Builders Supply Co.*, 287 NLRB 1364 (1988). Thus, I conclude the LaRocca was not a general agent of the Union.

LaRocca was clearly the leading and most prominent union supporter amongst bargaining unit employees, but he was not the only link between the Union and unit employees. LaRocca was the Union's election observer and distributed union hats. He also distributed authorization cards directly to individuals and indirectly through unit employees such as Mark Cunningham. LaRocca was the conduit of information between the union organizers and unit employees. He would tell employees where they could meet with the union representatives. LaRocca answered some questions about the Union himself but he directed other questions about the Union to the union organizers. LaRocca was also the only employee mentioned by the Union in a December 7, 2012 letter to the employer. However, that letter was written in response to the Employer's suspension of LaRocca.

Unlike the *Bristol Textile* case, many employees had direct access to and contact with Ed. Cecil, Assistant Union Organizing Director of Local 1350, as well as other union representatives. Cecil was observed by anti-union employees at a train station soliciting support and distributing authorization cards for the Union on at least 4-6 occasions. Anti-union employees also saw Cecil outside the company gate on other occasions. On most of these occasions they observed LaRocca with Cecil, but once Cecil was seen with Keith Little, another pro-union unit member. Anti-union employees also observed Cecil at a Burger King and a WAWA convenience store across the street from the plant. On some of these occasions LaRocca was with Cecil; on others he was not. Cecil's contact with employees who lived at the half-way house was limited by the control exercised on them by the half-way house. They had to travel to and from the plant in a van and apparently could not receive union solicitations at the house or leave the facility premises at any time prior to the end of their shift. Keith Little testified that Cecil visited him at home. It is also undisputed that other employees at the plant, such as Mark Cunningham, were also soliciting support for the Union and passed out authorization cards, and that the Union conducted off-site meetings to solicit employee support, Tr. 31-32, 42, 51-52, 63-64, 74-76, 110-12, 134-35, 146-47, Er. Exh. 5 at 26.

Diamond also testified that later that day, Little, with whom he had been friendly, told him that he had better “watch his back.” Diamond testified that the next morning, Curvy approached him and said, “don’t let me catch you outside the gate, because you’re a dead motherfucker. If I get you outside of here I’m going to kill you.” Diamond testified further that he invited Curvy to go out in the street and “settle this.” Curvy, according to Diamond, declined.

Diamond testified that there were 20-25 other employees in the vicinity of his confrontation with Curvy waiting to start work. He opined, “they had to hear it.” Despite this the Employer presented no witness to corroborate Diamond’s account. This is significant in that the Employer made a concerted effort after the tally of ballots to solicit evidence of union misconduct. Given the fact that 20 employees voted against union representation, one would expect that the Employer would be able to corroborate Diamond’s account of the December 18 meeting in the lunchroom and his confrontation with Curvy.

Diamond also testified that he was threatened again later in the day by Tyrone LaRocca. He also stated that someone left a threatening note on the front seat of his truck 10-15 minutes after being threatened by LaRocca. Diamond did not save this note.⁶

I would note that the Employer presented two other employees as witnesses at this hearing, Sean Varlow and Felix Rodriguez. Neither was asked whether they were at the December 18 lunchroom meeting or whether they witnessed a confrontation between Diamond and Curvy. From Diamond’s testimony, either or both may have been present in the lunchroom or in earshot of the alleged confrontation between Diamond and Curvy on December 19.

I would also note that Diamond did not mention these events to anyone until he was approached by the Employer’s Labor Consultant, Lauren Rosenfeld, between January 1 and 3, 2013. He never mentioned these events to the employer’s general managers in daily conversations with them between December 20 and January 1. His failure to bring these alleged death threats up to the Employer’s representatives, the police or anyone else for over a week undercuts the credibility of Diamond’s account.

Moreover, with the exception of Diamond’s testimony of what Curvy stated in the lunchroom, there is no evidence that Curvy was a union supporter.⁷ If Diamond had a confrontation with Curvy, it may well have been unrelated to the Union or the election campaign.

Finally, Diamond’s testimony is contradicted by that of Keith Little. I find Little’s testimony to be more credible than that of Stephen Diamond on the basis of the facts set forth

⁶ I decline to draw an adverse inference from the Union’s failure to call LaRocca as a witness because I find Diamond’s testimony so implausible. I am particularly struck by the fact that he was supposedly in fear for his life and did not mention these multiple threats to anyone for almost two weeks. Moreover, having found Little’s denial that he threatened Diamond more credible than Diamond’s testimony, there is no reason to believe Diamond’s account of the threats by LaRocca and Curvy.

⁷ Jose Rios, apparently a neutral witness, never had a conversation with Curvy about the Union, Er. Exh. 6, Tr. 17.

above (i.e., the absence of corroboration in circumstances in which one would expect it; the delay in reporting the events, etc.).

Little testified that he had planned to eat his lunch in the locker room on December 18. However, he was asked to go into the lunch room to listen to Diamond by Edrick Colzie, a manager. Little testified that as Diamond talked, he spoke up and said that he couldn't believe what Diamond was saying because Diamond had told him that he hated the Burlington facility. Little then walked out. He testified that he did not recall anybody else taking issue with Diamond. Little denied threatening Diamond at the meeting or afterwards. Little also testified that he did not hear Curvy threaten Diamond or even indicate that he supported the Union.

In summary, the Employer has the burden of proving that the objectionable conduct of which it complains, in fact occurred. It has not done so with regard to the alleged threats to Stephen Diamond. I therefore overrule this objection.

Alleged Coercion by Pro-Union Fork Lift Operators with regard to the quantity and quality of the pallets distributed to the nailers

Sean Varlow, an anti-union nailer, testified that the forklift drivers determine which nailers get the relatively good pallets and which nailers get the worse ones which take longer to repair. He testified further that the forklift drivers give the good pallets to their buddies. Varlow testified further that he complained that he was getting mostly badly damaged pallets to Taylor Thomas, one of the co-managers of the Burlington plant. Thomas told Varlow he was getting the bad pallets because he was the "new guy."

Varlow testified that on one occasion Tyrone LaRocca approached him and said something like "you work with me, I'll work with you." Varlow testified that in early December 2012, Ed Cecil the Union's Assistant Organizing Director, gave him a ride from the train station in Florence, New Jersey to the halfway house at which he worked in Trenton. LaRocca and Charles Van Artsdalen, the Union's organizing director, were also in the car. The four men discussed the Union. LaRocca and the two union organizers tried to convince Varlow to support the Union.

According to Varlow, they also discussed drug rehabilitation programs. Then LaRocca again told Varlow that if Varlow worked with LaRocca, LaRocca would work with Varlow.

Varlow's testimony that the forklift drivers controlled the quantity and quality of each nailer's pallets was not corroborated by Gary Cooper, the other of the Employer's plant managers. Cooper testified that if he sees a nailer out of pallets he directs a forklift operator to that nailer. Others managers would do the same thing. It is part of the responsibilities of Edrick Colzie, the plant's assistant general manager, to assure that no nailer is without pallets for any substantial period of time and to see, to best of his ability, that pallets are distributed fairly. Tr. 90-91. Cooper testified that a forklift driver has no control over whether a stack of pallets is good or bad, Tr. 91. There is no evidence that the forklift driver can be selective in choosing a stack to transport to the nailer.

John Rios, who was a nailer and so far as this record indicates is a neutral witness, testified at his deposition that whether a nailer gets good or bad pallets is “like rolling dice, you never know what you’re going to get in a pile,” Er. Exh. 6, Tr. 13-14.

On the other hand, Luis Mercado, in his jailhouse deposition, testified that the forklift drivers determined whether a nailer received pallets that were easy or difficult to fix, Er. Exh. 5, Tr. 11-12. Mercado also testified that he believed that the forklift drivers were bringing bad pallets to nailers who were against the Union, Tr. 18-19. Mercado never expressed this opinion to any manager, or any other person other than Sean Varlow, until Lauren Rosenfeld solicited a statement from him on January 3, 2013. I do not find Mercado credible. For one thing, Sean Varlow cited the fork drivers’ favoritism towards Mercado as an example of the discrimination against himself, Tr. 71. Varlow testified that on one occasion Mercado finished 62 stacks of pallets and he finished only 18, assumedly because the forklift drivers were giving Mercado the good pallets and giving him the badly damaged ones.

In sum, I conclude that the Employer had not met its burden that of proving that pro-Union forklift drivers discriminated against any nailer in an effort to get them to support the Union.

Conclusion

I recommend that the Employer’s Objections to the Petitioner’s Alleged Conduct affecting the outcome of the election be overruled and that the results of the election be certified.

RECOMMENDED CERTIFICATION OF RESULTS OF ELECTION

It is certified that a majority of the valid ballots have been cast for United Food and Commercial Workers Union Local 1350, and that it is the exclusive representative of the bargaining unit employees at the Employer’s Burlington, New Jersey facility.⁸

Dated at Washington, D.C. this 30th day of September 2013.

Arthur J. Amchan
Administrative Law Judge

⁸ Under the provisions of Sec. 102.69 of the Board’s Rules and Regulations, exceptions to this Report may be filed with the Board in Washington, DC within 14 days from the date of issuance of this Report and recommendations. Exceptions must be received by the Board in Washington DC by October 15, 2013.